BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear, as this is an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344 (b), provides for review in this Court by certiorari of decisions of the highest courts of the several states where any right, title, privilege or immunity, is specially set up or claimed under a statute of the United States.

Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242;
Bailey v. Central Vermont Ry., 319 U. S. 350, 87 L. Ed. 14, 44;
Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;
Seago, Admrx., v. New York Central R. Co., 315 U. S. 781.

II.

If the opinion of the Court below is permitted to become authoritative, the uniformity of right and remedy sought to be effected by the Act (Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242) is utterly destroyed.

The various courts apply the doctrine which permits a plaintiff to recover notwithstanding his own fault or negligence in different ways, each requiring its own quantum and quality of evidence. It suffices for our purpose to divide the different applications of this rule into two

classes, "the last clear chance doctrine" and "the Missouri humanitarian doctrine." Both stem from the same source, as do all of the versions of the doctrine permitting recovery notwithstanding plaintiff's fault.

(a) The last clear chance doctrine as interpreted and applied by the federal courts requires as requisites to liability proof: (1) of plaintiff's position of imminent peril; (2) of defendant's actual notice thereof; (3) of the termination of plaintiff's own negligence prior to injury; (4) of defendant's ability, after acquiring such actual notice and subsequent to the termination of plaintiff's negligence, to avert the impending injury; (5) of defendant's negligent failure so to do, and (6) of plaintiff's proximately resulting injury.

K. C. Southern R. Co. v. Ellzey, 275 U. S. 236, 48 S. Ct. 80, 81, 72 L. Ed. 259, 261;
Chunn v. City & Suburban Ry., 207 U. S. 302, 52 L. Ed. 219;
St. L. & S. F. R. Co. v. Schumacher, 152 U. S. 77, 38 L. Ed. 361, 362;
Toledo, St. L. & W. R Co., 276 U. S 166, 72 L Ed. 513, 517;
Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 F. 41.

(1) Moreover, the federal doctrine of last clear chance applies to cases brought under the Act as well as to other negligence cases.

Iowa Central Ry. Co. v. Walker, 203 F. 685;
DeBaur v. Lehigh Valley R. Co., 269 F. 694;
Southern R. Co. v. Verelle, 57 F. 2d 1008;
Brennan v. B. & O. R. Co., 115 F. 2d 555.

(b) The Missouri humanitarian doctrine requires proof of the following elements: (1) plaintiff's position of peril, (2) defendant's actual or constructive knowledge thereof, (3) defendant's ability thereafter to avoid injury to plain-

tiff, (4) defendant's negligent failure to take the available steps to avoid the injury, and (5) the resulting injury to plaintiff.

Banks v. Morris & Co., 302 Mo. 254, 267, 257 S. W. 482.

The last clear chance doctrine therefore requires proof that defendant had actual rather than constructive knowledge of plaintiff's peril, whereas the Missouri humanitarian doctrine requires proof of either actual or constructive notice of plaintiff's peril. The last clear chance doctrine requires proof that plaintiff's negligence had terminated before the casualty occurred; whereas the Missouri humanitarian doctrine requires no such proof.

Obviously, therefore, the liability encompassed by the Missouri humanitarian doctrine is considerably broader than that embraced by the last clear chance doctrine. More proof is required for submission under the last clear chance doctrine than under the Missouri humanitarian doctrine.

(c) Because the elements of the two doctrines are different, it necessarily follows that because the federal courts accept and apply the last clear chance doctrine and do not accept and apply the Missouri humanitarian doctrine, there can be no recovery based upon the principles of the latter doctrine in any case brought under the Act. Congress purposed that the Act should be comprehensive "of those instances in which it excludes liability" as well as in "those in which liability is imposed." Its purpose was "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states." The purpose of

Congress was emphatically not to leave the states free to require "compensation where the Act withholds it."

Erie R. Co. v. Winfield, 244 U. S. 170, 172, 61 L. Ed. 1057, 1065;
N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150, 61 L. Ed. 1045, 1048;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

(d) Therefore, if the courts of Missouri are to be permitted to allow recovery in this character of case, under the Missouri humanitarian doctrine which requires proof of two fewer elements than does the federal last clear chance doctrine which alone is accepted and applied by the federal courts and by all state courts except those of Missouri, there can be no uniformity of right or remedy.

(e) The incongruity of the opinion of the Court below lies in the fact that whereas it has affirmed the judgment rendered in the trial court on the theory of the applicability of the Missouri humanitarian doctrine which alone is hypothesized in respondent's instruction directing a verdict in her favor, nevertheless it refuses to apply the federal last clear chance doctrine because it says that under the Act contributory negligence can never be taken out of the case. Obviously, if the Act destroys the last clear chance doctrine, it unquestionably destroys the Missouri humanitarian doctrine as well, for as the Court below has held many times, a necessary requisite to the applicability of the Missouri humanitarian doctrine is that both primary and contributory negligence shall be wholly disregarded, and defendant's liability must be measured solely on its ability and its failure to avert the injury in question, after both primary and contributory negligence have "passed out of the case."

State ex rel. Fleming v. Bland, 322 Mo. 565, 572, 15 S. W. (2d) 798, 801;

Todd v. St. L.-S. F. R. Co., 37 S. W. (2d) 557, 561;
Gray v. Columbia Terminals Co., 331 Mo. 73, 52 S W. (2d) 809, 813.

(1) In fact, the Court below has gone to the extent of holding not only that "contributory negligence is an issue wholly foreign to a case submitted purely under the humanitarian rule"; but has held that an instruction offered by a defendant which submits contributory negligence as a defense only in case the jury shall find against plaintiff under the humanitarian rule, constitutes reversible error, because both primary and contributory negligence have "passed out of the case" and the instruction injected "into the case a foreign issue."

Todd v. St. L.-S. F. R. Co., supra;
Gray v. Columbia Terminals Co., supra.

III.

The Court below holds in the second opinion herein and reiterates in its latest opinion, that because the Act provides that contributory negligence shall not bar plaintiff's cause of action but shall effect a diminution of damages only, the last clear chance doctrine as interpreted and applied by the federal courts can no longer sustain liability in cases under the Act.

The Court below reasons as follows: The federal last clear chance doctrine requires the termination of plaintiff's negligence as a condition precedent to the applicability of that doctrine. The Act destroys plaintiff's contributory negligence as a defense to a suit under the Act, and keeps it in the case as a decisive factor in determining the amount of damages. Therefore, the Act has done away with the doctrine of last clear chance. Assuming the correctness of this reasoning, it is interesting to speculate how the Court below can affirm a judgment based upon the Missouri humanitarian doctrine, which

is no more than Missouri's version of the last chance doctrine.

(a) It is submitted that the opinion of the Court below is erroneous for the reason that in considering a case under the last clear chance doctrine, the question is not whether both plaintiff and defendant have been negligent, but whether or not even though both parties have been negligent, the defendant after the termination of plaintiff's negligence, whether contributory or sole, and after actual discovery of plaintiff's peril, had a later opportunity to avoid injuring the plaintiff and failed to take advantage of it.

(1) The principles of the last clear chance doctrine do not and cannot commence to operate until the point has been reached where the antecedent negligence of both plaintiff and defendant is to be wholly ignored in the determination of liability vel non. No last clear chance duty is cast upon defendant until that point shall have been reached.

(2) The recognition and application of the comparative negligence rule in no wise affects the last clear chance doctrine.

Seiffert v. Hines, Director General, 108 Neb. 62, 187 N. W. 108;
Stanley v. C. R. I. & P. R. Co., 113 Neb. 280, 202 N. W. 864;
Parsons v. Berry, 130 Neb. 264, 264 N. W. 742;
Wolfgang v. Omaha & Council Bluffs St. Ry. Co., 126 Neb. 600, 262 N. W. 537, 17 Neb. L. D. 68 (1938);
McLaughlin et al. v. Long et al. (1927), 2 D. L. R. 186;
Johnston v. McMorran (1927), 4 D. L. R. 335;
Raines v. Southern R. Co., 169 N. C. 189, 85 S. E. 294.

(b) The last clear chance doctrine does neither more nor less than provide a method of fixing liability on defendant provided his negligence was the proximate cause of the injury.

Chunn v. City & Suburban Ry. Co., 207 U. S. 302, 309, 28 S. Ct. 63, 52 L. Ed. 219;
Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 1101;
Seaboard Air Line R. Co. v. Tilghman, 231 U. S. 499, 501, 59 L. Ed. 1069, 1070;
I. C. R. Co. et al. v. Porter, 207 F. 311, 316;
Pennsylvania R. R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) The Act uses the term "contributory negligence." There can be no "contributory" negligence in the absence of primary negligence by defendant. Therefore, the provision of the Act that plaintiff's contributory negligence shall not bar his recovery but shall do no more than diminish the amount of his recovery not only presupposes negligence by both plaintiff and defendant, but presupposes also that the negligence of both shall continue to the instant of injury and shall together constitute the proximate cause of the casualty.

Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 1101;
Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. Ed. 1069, 1070;
I. C. R. Co. et al. v. Porter, 207 F. 311, 316.

(2) It is obvious that if after the termination of plaintiff's negligence and upon actual discovery of his danger by defendant, the latter has an opportunity to avoid injuring the former, neither plaintiff's nor defendant's antecedent negligence can form a part of the proximate cause of his injury, and all antecedent negligence is as though it had never existed. The duty then for the

first time in the course of the happening, rests upon the defendant to avoid injury to plaintiff. It is the violation of this duty which is the foundation of liability under the last clear chance doctrine.

IV.

The facts in the case at bar, and they are wholly undisputed and consist solely of the testimony of respondent's witnesses, do not disclose an action in respondent's favor under the last clear chance doctrine. The evidence wholly fails to show the termination of decedent's negligence prior to the casualty, that petitioner's engineer had any actual notice of any danger to decedent, and that the engine could have been stopped or any additional warning (the bell was ringing) could have averted the casualty. Consequently, petitioner's engineer had no opportunity to avoid injuring decedent, who was struck by the locomotive just as he stepped upon the track (R. 45). The facts being undisputed, no jury question was made.

DeBaur v. Lehigh Valley R. Co., 269 F. 964;
Southern R. Co. v. Verelle, 57 F. (2d) 1008;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224.

V.

Appellee's own gross negligence in stepping on the track at practically the same instant he was struck, and after he had been three times informed particularly how the switching movement was to be made and warned to stay out of the way of both the car and the engine, was the sole proximate cause of his death.

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, 73 L. Ed. 957;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;
DeBaur v. Lehigh Valley R. Co., 269 F. 964;
Southern R. Co. v. Verelle, 57 F. (2d) 1008.

VI.

As has been stated, all of the evidence in this case was produced by respondent. It is in no way inherently incredible; it is not contradicted; the witnesses displayed no hostility towards respondent's cause. For that reason respondent is bound by the testimony.

Pennsylvania R. Co. v. Chamberlain, 228 U. S. 333, 77 L. Ed. 819;
Southern Ry. Co. v. Walters, 284 U. S. 190, 76 L. Ed. 239.

Despite this situation, respondent's counsel took the position in arguing this case to the jury, that his own witnesses were unworthy of belief, and that even though there was no evidence to contradict anything his witnesses said, the jury should refuse to believe the witnesses, and should find a verdict directly in the face of the testimony of his witnesses and base it not upon any evidence, but upon the theory that whatever evidence he introduced was false (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190).

VII.

Respondent's counsel committed reversible error in his argument to the jury in the trial court, under the law as announced by this Court. He made a viciously unfair attack upon his own witnesses and appealed to the passions and prejudices of the jurors to such an extent that it created an "atmosphere of hostility" towards appellant in this case and prevented it from obtaining a fair trial.

He repeatedly charged his own witnesses with false swearing, and time after time requested the jury not to believe their evidence, but to find a verdict directly contrary to their evidence, although such a verdict would be wholly unsupported by any evidence. He warned the jury that

they should be very careful in accepting the testimony of his own witnesses, because they were in appellant's employ (R. 181).

He informed the jury that he knew why decedent was in the position he was when he was killed and that he was looking for a block to keep the car which was being switched from rolling back and fouling the switch point, although there was no evidence whatever to sustain his statement (R. 186).

He misstated the law with respect to the yardstick for measuring respondent's damages (R. 149), by saying that respondent should recover decedent's total earnings for thirty-five years, less what the support of his wife and children would have been during that period, rather than the present value of decedent's earnings which is the correct measure given in her own instruction No. 7 (R. 49).

L. & N. R. Co. v. Holloway, 246 U. S. 525, 62 L. Ed. 867.

This character of argument has been condemned by this Court which has held that it cannot be cured by a remittitur, but the situation calls for a new trial, especially if the verdict is excessive. The Court will notice that the verdict in this case rendered by the jury was for the sum of Fifty-five Thousand Dollars ($55,000.00). It can scarcely be denied that the verdict was excessive in view of the fact that the trial court ordered a remittitur of of Ten Thousand Dollars ($10,000.00) and respondent remitted that sum (R. 195).

M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

ARGUMENT.

I.

This Court's jurisdiction is well settled in this character of case, as it is an action brought under the Federal Employers' Liability Act, and the controversy therefore involves a right claimed under that act of Congress.

The reasons for the exercise by this Court of its jurisdiction over this case are highly persuasive. For the first time since the passage of the Act a suit brought under its terms has been decided upon the theory that its provisions destroy last clear chance negligence as a ground for recovery in this character of case. It is difficult to underestimate the importance of an authoritative ruling by this Court on this question. Despite the fact that several federal courts have applied the doctrine of last clear chance to actions brought under the Act, the Missouri Supreme Court in its second and third opinions herein definitely holds in effect that because the Act provides for the application of the comparative negligence principle by declaring that a plaintiff's contributory negligence shall not bar his right to recover but shall do no more than diminish the amount he may recover, there can be no recovery in this character of case under the doctrine of the last clear chance.

In the same opinion, however, the Court below holds that recovery may be had upon the principles of the Missouri humanitarian doctrine. Both the last clear chance doctrine and the humanitarian doctrine are based upon the theory that a plaintiff may recover in spite of or notwithstanding his own negligence, provided defendant's negligence was the proximate cause of the injury. Consequently, under both of the doctrines it is necessary that the defendant's primary negligence and the plaintiff's contributory negligence must be taken out of the case before the question of liability may be determined upon either

the last clear chance doctrine or the Missouri humanitarian doctrine. Obviously, therefore, they stand upon the same footing, so far as the comparative negligence principle established by the Act is concerned. As a consequence, if there can be no recovery on the last clear chance doctrine because of the existence of the comparative negligence principle established by the Act, for the same reason there can be no recovery on the Missouri humanitarian doctrine.

The question here involved, therefore, is of the most serious moment to all of the railroads and to all of their employees.

It is said in the second opinion of the Court below (176 S. W. 2d, l. c. 611): "We think these facts raised an issue for the jury, though the question is close and ultimately a Federal question." This Court is in agreement. Brady v. Southern R. Co., 320 U. S., l. c. 479, 88 L. Ed., l. c. 243.

II.

Unless this Court accepts jurisdiction on this cause and decides the questions here involved, the uniformity of right and remedy sought to be effected by the Act [Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242] is completely destroyed.

The principle upon which recovery is permitted plaintiff notwithstanding his own negligence is interpreted and applied in many ways. For the purposes of our discussion it is found convenient to distinguish two of the versions of that doctrine by calling one the "last clear chance doctrine" and another the "Missouri humanitarian doctrine." Both stem from the same source and are but different applications of the same principle.

(a) The last clear chance doctrine as interpreted and applied by the federal courts, including this Court, re-

quires proof of certain facts as predicates of liability. See Summary of Argument, supra, III (a). At this point we are concerned with but two of those predicates, viz., (1) actual notice to defendant of plaintiff's perilous position, and (2) the termination of plaintiff's negligence prior to the casualty.

(1) So far as petitioner has been able to determine, this Court has never directly passed upon the applicability of the last clear chance doctrine to actions brought under Federal Employers' Liability Act; but other federal courts have recognized its applicability. These cases have been cited in the Summary of Argument under III, (a), (1).

(b) The Missouri humanitarian doctrine requires proof of five elements: (1) plaintiff's position of peril, (2) defendant's actual or constructive knowledge thereof, (3) defendant's ability thereafter to avoid injuring the plaintiff, (4) defendant's negligent failure to take the available steps to avoid the injury, and (5) resulting injury to the plaintiff. Bank v. Morris & Co., 302 Mo. 254, 267, 257 S. W. 482.

It will be noticed that there are two sharply defined differences between the last clear chance doctrine as interpreted and applied by the federal courts, and the Missouri humanitarian doctrine. Under the former, plaintiff is required to prove defendant's actual knowledge of plaintiff's perilous position, whereas under the latter he is required to prove only constructive knowledge of such peril. Under the federal last clear chance doctrine plaintiff must prove that his negligence terminated before the casualty, and, moreover, a sufficient length of time before the occurrence to give defendant an opportunity to take steps to avoid it; whereas under the Missouri humanitarian doctrine there is no such requirement.

These differences between the two doctrines are of vital importance. Proof amply sufficient to warrant a recovery

under the Missouri humanitarian doctrine is wholly insufficient to warrant a recovery under the last clear chance doctrine, for the reason that it wholly fails to prove two necessary elements of the last clear chance doctrine, viz., defendant's actual notice of plaintiff's peril and the termination of plaintiff's negligence prior to injury. Moreover, a petition which pleads and instructions which submit a Missouri humanitarian doctrine case are wholly insufficient to state and submit a cause of action under the last clear chance doctrine, for the reason that neither the petition nor the instructions need cover these two elements of the last clear chance doctrine.

(c) It necessarily follows, therefore, that because the federal courts accept and apply the last clear chance doctrine and do not accept and apply the Missouri humanitarian doctrine there can be no recovery under the Missouri humanitarian doctrine in any case brought under Federal Employers' Liability Act.

When Congress passed the Act, it intended that it should be comprehensive "of those instances in which it excludes liability" as well as "those in which liability is imposed." The purpose of the Act was "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states"; and not to leave the state free to require "compensation where the Act withholds it." Erie R. Co. v. Winfield, 244 U. S. 170, 172, 61 L. Ed. 1057, 1065; N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150, 61 L. Ed. 1045, 1048; C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

As this Court has said in many cases, the Federal Employers' Liability Act occupies the entire field of liability between employees of railroads and their employers, engaged in interstate commerce; and excludes regula-

tion thereof by the state, either legislatively or judicially. Because respondent seeks recovery under that Act of Congress, her rights must be determined and adjudicated by the rules accepted and applied by the courts which have jurisdiction to interpret that Act. It requires no citation of authority to support the statement that only the federal courts have jurisdiction to interpret and apply the Act.

Because the Act does not define what shall or shall not constitute actionable negligence, this question must be determined by the courts which have the power to interpret the Act, viz., the federal courts. Necessarily, this determination requires the federal courts to determine also what acts shall not be recognized as actionable negligence under the Act. As a consequence, when the federal courts recognize proof of certain facts as establishing actionable negligence on the part of a defendant, obviously and necessarily evidence which falls short of proving those facts falls short as well of proving a case under the Act.

To state it somewhat differently, the recognition and application of the requisites for last clear chance negligence by the federal courts establishes the minimum requirements for liability notwithstanding plaintiff's negligence. Ipso facto, evidence which does not measure up to these minimum requirements is insufficient to make a case under the Act. Because evidence which may be sufficient to make a case under the Missouri humanitarian doctrine is wholly insufficient to make a case under the federal last clear chance doctrine, no recovery may be had in this character of case under the Missouri humanitarian doctrine.

(d) The conclusion is inescapable that unless this Court assumes jurisdiction in this cause and holds that there can be no judgment herein based upon the principles of the Missouri humanitarian doctrine, there can be no uniformity of right or remedy under this Act.

So far as petitioner has been able to ascertain, the Missouri humanitarian doctrine has no counterpart in any other jurisdiction in the United States, state or federal. This Court has held in many cases that a plaintiff may bring his suit under this Act in any state court or in any federal district court in which service may properly be had upon a defendant. Petitioner is subject to suit in both Missouri and Illinois. As a consequence, a plaintiff injured by the alleged negligence of petitioner in Missouri, may bring his action to recover damages therefor in the state court of Missouri, the federal district court of Missouri, the state court of Illinois, or the federal district court of Illinois. The Civil Courts Building in the City of St. Louis is directly across Market Street from the New Federal Building, the former on the north side of the street, the latter on the south. If the opinion of the Court below is permitted to become authoritative, plaintiff's right to recover in a case of this kind will depend on whether or not he files his suit on the north or the south side of Market Street. If he files it on the north side of Market Street in the state court he will be permitted to recover under the Missouri humanitarian doctrine. If he files it on the south side of Market Street in the United States District Court, he will not be permitted to recover because that Court does not recognize the Missouri humanitarian doctrine as a ground for recovery in this character of case, and plaintiff has not proved a last clear chance case. If he files his suit in either the state court or the Federal District Court in the State of Illinois, he cannot recover in either; for the reason that neither of those courts recognizes and applies the Missouri humanitarian doctrine. As a result of this situation, petitioner is put entirely at the mercy of respondent's caprice. If petitioner must defend a case of this character in the state court, it loses; if it has an opportunity to defend the same case in the federal court, it wins. Thus, the de-

cision in the case is not determined by the Federal Employers' Liability Act, nor is it determined by the law, by right or justice. The result is controlled solely by the choice of forum made by respondent.

This problem affects not only the situation as it exists in the State of Missouri; but due to the many and varying applications by the courts of the different states with respect to a plaintiff's right to recover notwithstanding his own negligence, the problem exists in those states as well. Many of them do not follow the last clear chance doctrine as announced by the federal courts. As a consequence, the same situation would exist in those states as exists here, viz., a plaintiff's ability to recover would depend upon whether he saw fit to commence his action in a state court or a federal district court.

(e) In any event, it is not seen how the opinion of the Court below can be affirmed.

This cause was submitted in the trial court (R. 147, 148) upon the principles of the Missouri humanitarian doctrine. There is no requirement in respondent's principal instruction that the jury shall find either that petitioner's servant had actual knowledge of decedent's danger or that decedent's negligence terminated prior to his injury. Therefore, the instruction is wholly insufficient to submit this case under the federal last clear chance doctrine.

The Court below has affirmed the judgment so obtained, and justifies its action by saying that under the Act contributory negligence can ever be taken out of a case brought under the Act. This conclusion reached by the Court below will be discussed in detail in the next section of this argument. It is obvious, however, that if this conclusion is correct, then necessarily there can be no recovery herein under the Missouri humanitarian doctrine.

The Missouri courts describe defendant's negligence which is antecedent to the commencement of its duty under the principles of the Missouri humanitarian doctrine, as primary negligence; and plaintiff's negligence antecedent to the commencement of defendant's duty under that doctrine, contributory negligence. For convenience those terms will be used in this discussion.

If, as is implicitly held in the current opinion of the Court below, contributory negligence continues to be a decisive factor in all cases prosecuted under this Act, then obviously the reason for the existence of any principle permitting recovery notwithstanding plaintiff's negligence ceases to exist. If the conclusion of the Court below is sound, then every case brought under the Act must be decided exclusively upon the existence of primary negligence on the part of defendant, and, if the evidence is sufficient to prove it, contributory negligence on the part of plaintiff. The necessary result is that if defendant has been guilty of any primary negligence, plaintiff will always be entitled to recover no matter how gross his negligence may have been; no matter how long it continued; and no matter if defendant never saw plaintiff in a position of danger. As a consequence, there will never be an occasion for applying the principles which permit recovery notwithstanding the negligence of plaintiff.

But the Court below has held for a long period of years and in many cases that if recovery is had upon the Missouri humanitarian doctrine both primary and contributory negligence shall be wholly disregarded and shall perform no decisive service in the case. On the other hand, in that character of case defendant's liability must be measured solely on its ability and its failure to avert the injury in question after both primary and contributory negilgence have "passed out of the case." State ex rel. Fleming v. Bland, 322 Mo. 565, 572, 15 S. W. 2d 798, 801.

(1) The Court below has carried this doctrine to such an extent that it holds not only that "contributory negligence is an issue wholly foreign to a case submitted purely under the humanitarian rule"; but has condemned as reversibly erroneous an instruction given at defendant's request which submits contributory negligence as a defense only in case the jury shall find against plaintiff under the humanitarian rule. The reason assigned by the Court is that both primary and contributory negligence had "passed out of the case" and such an instruction injected "into the case a foreign issue." Gray v. Columbia Terminals Co., 331 Mo. 73, 52 S. W. 2d 809, 813.

Despite these decisions, the present opinion of the Court below says:

> "Whether the facts as proven fit the pattern of the humanitarian doctrine as recognized by the Missouri courts or whether the facts fit the pattern of the last chance rule has nothing to do with this case."

In view of the fact that this case was submitted in the trial court exclusively on the Missouri humanitarian doctrine, this language of the Court is difficult to understand. Moreover, when the decisions of the Court below holding that before the Missouri humanitarian doctrine can become applicable, all primary and contributory negligence must have "passed out of the case" it becomes more difficult to understand how that Court could have affirmed the judgment of the trial court and at the same time held that it made no difference whether the facts proved brought the case within the last clear chance doctrine or the Missouri humanitarian doctrine.

Is it to be supposed that in every case except one under the Act, which reaches the Court below and which has been decided upon Missouri humanitarian negligence, it will be held that both primary and contributory negligence have passed out of the case before the humani-

tarian doctrine commenced to operate, whereas in every case which reaches the Court below and which is founded upon the Federal Employers' Liability Act, it will be held that regardless of the character of negligence submitted, whether last clear chance or Missouri humanitarian, contributory negligence remained in the case for all purposes? In other words, will the Court below hold in all humanitarian doctrine cases except those brought under this Act, that the antecedent negligence of both plaintiff and defendant has ceased to be a determinative factor and that the doctrine is applicable, and at the same time hold that in all cases brought under the Act, the antecedent negligence remains a determinative factor, and nevertheless affirm a recovery under the Missouri humanitarian doctrine.

III.

The holding of the Court below both in the present opinion and in the second opinion is that because the Act provides that contributory negligence shall not bar plaintiff's cause of action, but shall do no more than diminish the recoverable damages, the last clear chance doctrine as interpreted and applied to the federal courts, is never applicable to this character of case.

On this question the Court below said on page 3 of the current opinion that petitioner's principal point upon appeal was that this cause was submitted to the jury under the Missouri humanitarian doctrine which is not recognized by the federal courts, rather than the last clear chance doctrine which is recognized by the federal courts. That Court proceeded with the statement that the respondent insisted that this cause must be governed by the federal statute (Federal Employers' Liability Act) and that the distinction between the humanitarian doctrine and the last clear chance doctrine has no bearing on the case. "We are of the opinion that respondent's position is correct,"

said the Court. "We so held on the former appeal * * * where the question was discussed at length. * * * We have again examined the question and we adhere to our former ruling."

The former opinion (the second opinion) states that appellant (petitioner here) contended that no prima facie case was made in the trial court for the reason that respondent made no case under the last clear chance doctrine whereas the cause was submitted to the jury under the Missouri humanitarian doctrine which is not recognized by the federal courts as furnishing a basis for liability.

The Court then stated respondent's position as follows:

> "Respondent argues to the contrary that under the express terms of the Federal Employers' Liability Act the defendant railroad is liable for its own negligence regardless of whether the contributory negligence of the injured person was actualy discovered or merely reasonably discoverable; and also regardless of whether that contributory negligence had ceased so that the defendant had a last chance to avert the casualty, or whether it continued actively up to the event. In other words, respondent maintains the contributory negligence does not defeat the **right** (emphasis the Court's) of recovery, but affects only the **amount** (emphasis the Court's) or recovery. We think this latter view is correct."

On page 4 of the present opinion the Court below says further:

> "The vital questions, therefore, * * * were whether the defendant's agents and servants were negligent and if so whether such negligence in whole or in part contributed to Mooney's injury. An affirmative answer to both questions establishes liability. Whether the facts as proven fit the pattern of the humanitarian doctrine as recognized by the Missouri courts or whether the facts fit the pattern of the last

> chance rule has nothing to do with the case. The federal Act does not make any exception, nor should one be read into the law by the court."

On the next page, 5, of the second opinion written by the Court below, and after quoting certain language from the Act, the Court says:

> "There is nothing on the face of these sections warranting the construction that the contributory negligence of the deceased **will** (emphasis the Court's) bar a recovery if not timely discovered or if continued up to the moment of his injury. They say the opposite."

There is but one conclusion which may be drawn from this language, namely, that because of the provision in the Act that contributory negligence on the part of the plaintiff shall not bar his recovery for damages, the last clear chance doctrine can no longer sustain liability in cases under the Act. The Court below reasons as follows: The federal last clear chance doctrine requires the termination of plaintiff's negligence as a condition precedent to the applicability of that doctrine. The Act destroys plaintiff's contributory negligence as a defense to a suit under the act, but leaves it effective only to diminish the amount of plaintiff's recovery. Therefore, the Act has done away with the doctrine of last clear chance.

The fault in this reasoning lies in the failure to recognize that like all other kinds of negligence, last clear chance negligence is a breach of duty owed plaintiff by defendant. No duty to avoid injuring plaintiff arises under the last clear chance doctrine unless and until defendant acquires actual knowledge of plaintiff's peril and the latter's negligence has ceased. Obviously, there can be no duty on defendant not to injure plaintiff until defendant knows of the existence of the danger to plaintiff. Just as obviously, defendant cannot be afforded the

last clear chance of avoiding the injury unless plaintiff's negligence ceases in time to make effective defendant's efforts to avoid it. Otherwise, plaintiff may always neutralize defendant's efforts to avoid the casualty, and, at the same time, hold defendant responsible for his injury.

There is no inconsistency between applying both the comparative negligence doctrine and the last clear chance doctrine under the Act. The comparative negligence theory applies only to primary and contributory negligence, whereas the federal courts hold that the last clear chance doctrine is but a phase of proximate cause, and is put in operation only if neither defendant's primary negligence nor plaintiff's contributory negligence is found to be the proximate cause of the injury. Pennsylvania R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) The very essence of the last clear chance doctrine is the principle that neither the negligence of defendant nor that of plaintiff, which occurred prior to the actual discovery of plaintiff's peril shall in any wise affect the case. Unless both primary and contributory negligence are taken completely out of the case, there can be no last clear chance doctrine. There can be no reason for the existence of such a doctrine if both primary and contributory negligence are to remain effective in the case. Consequently, the last clear chance doctrine is based on the principle that at the time it commences to operate in plaintiff's favor, consideration of all previous negligence of both parties to the action must be wholly abandoned. It is a logical impossibility to apply the last chance doctrine to a case brought under the Federal Employers' Liability Act if its provisions are to be construed as keeping in the case for the consideration of both court and jury, the primary negligence of defendant and the contributory negligence of plaintiff, and thereby avoiding the reason for, and the commencement of, the operation of the last clear chance doctrine. How is it logically possible to apply a doctrine

which commences to operate only when a point is reached where all antecedent negligence of both parties has gone out of the case, if the action is brought under a statute the effect of which is to keep all antecedent negligence in the case?

If all antecedent negligence remains in every case brought under the Act, for the purpose of permitting plaintiff to recover, then such negligence remains in the case for all purposes. It cannot be in the case for the purpose of permitting plaintiff to make a prima facie case and be out of the case for the purpose of depriving defendant of taking advantage of it for the purpose of minimizing the damages. Necessarily, if, as the Court below has held, last clear chance negligence is destroyed by the Act and contributory negligence remains in the case, a defendant will be entitled to have the court instruct the jury that any recovery against it shall be diminished by the proportion that the decedent's negligence bears to the whole negligence in the case. Moreover, this will be true whether or not defendant has pleaded contributory negligence; for the very reason that under the holding of the Court below, contributory negligence cannot be taken out of the case by anything which is done by either of the parties. Therefore, it remains in the case for all purposes at all times. One of those purposes is to diminish the amount of plaintiff's recovery.

If this conclusion is correct, then what necessity is there for applying the last clear chance rule in any case brought under the Act? It can serve no purpose. If plaintiff recovers on primary negligence, and he must do so in the absence of any last clear chance doctrine, and if defendant is entitled to minimize plaintiff's damages by reason of the latter's contributory negligence, then the result is that the case is tried as an ordinary common law negligence case, without the necessity or possibility of the interposition of any last clear chance doctrine.

Suppose decedent had fallen on the track on the occasion of his death, as a result of an attack of epilepsy. Obviously, in that instance he could not have been guilty of any negligence whatever, sole or contributory. Suppose further that suit had been brought under the Act. Could recovery then have been had under the last clear chance doctrine as announced and applied by the federal courts?

Under the interpretation given the Act by the Court below, there could have been no recovery under any legal principle. That Court has said that that Act retains primary and contributory negligence, and prevents the application of either the humanitarian or the last clear chance rules for the reason that contributory negligence never goes out of the case.

Here is an instance in which there was neither primary nor contributory negligence. There could have been no primary negligence, as defendant was not responsible in any way for the perilous position of decedent on the track. Decedent could not have been guilty of any contributory negligence because his presence on the track resulted from something entirely beyond his control. Would it be held that there could be no recovery in the case at all, on the ground that the Federal Employers' Liability Act precluded the application of the last clear chance doctrine? Unless it would, then the interpretation of the language of the Act made by the Court below is unsound. Unless it would be so held, the Act still envisages a recovery thereunder on the last clear chance doctrine. Last clear chance negligence, we repeat, cannot be both in and out of the Act at the same time and for different cases and purposes. It is either discarded by the Act in every case and under every conceivable condition, or it is not discarded in any case or under any condition.

(b) It is submitted that the opinion of the Court below is erroneous for the further reason that in considering a case under the last clear chance doctrine, the question is not whether both plaintiff and defendant have been negligent, but whether or not even though both parties have been negligent, the defendant, after the termination of plaintiff's negligence, whether contributory or sole, had a later opportunity to avoid injuring plaintiff and failed to take advantage of it.

(1) There is no reason for the existence of the last clear chance doctrine, if the antecedent negligence of both plaintiff and defendant is to remain determinative of the case. If, as is held by the Court below, the Act, by recognizing the effect of the comparative negligence doctrine, keeps plaintiff's negligence in the case regardless of the existence or non-existence of proximal causal connection between it and plaintiff's injury, then there cannot possibly be a case in which there is any occasion for the application of the last clear chance doctrine.

The underlying principle of the last clear chance doctrine is that it does not commence to operate until the necessity therefor arises. No such necessity can arise if the case is to be determined exclusively upon the antecedent negligence of both plaintiff and defendant. Not only the name of the doctrine but the doctrine itself is wholly meaningless unless it becomes effective at the exact point where and when the antecedent negligence of both plaintiff and defendant produces such a condition as precludes the determination of whose negligence is the proximate cause of plaintiff's injury. When that point shall have been reached, then the law says that in order to avoid such an impasse, it will overlook all antecedent negligence and place the responsibility for the casualty upon him who had the last clear chance of avoiding it. Obviously, if the negligence of plaintiff continues to the

moment of injury, defendant cannot have had the last clear chance of avoiding injury to plaintiff. Unless defendant had actual notice of plaintiff's peril, he cannot avoid injuring plaintiff.

(2) The application of the principle of comparative negligence does not affect the last clear chance doctrine. The question has arisen several times in Nebraska and in Canada under comparative negligence statutes. In every case which petitioner has been able to find, the holding has been that the recognition and application of the comparative negligence rule in no wise affects the last clear chance doctrine. See Summary of Argument, III, (a), (2).

(b) As petitioner construes the decisions of this and other federal courts, the last clear chance doctrine is not a separate and distinct thing which grew "out of the establishment or creation of any new responsibility fixed by law upon wrongdoers," but it is neither more nor less than a method of creating liability upon a defendant if his negligence was in truth the proximate cause of plaintiff's injury. Pennsylvania R. Co. v. Swartzel, 17 F. (2d) 869, 870.

(1) This Court has recognized the last clear chance doctrine as but another aspect of the principle of proximate cause. This is conclusively shown by this Court's refusal to cast liability upon defendant without proof that plaintiff was actually seen in a position of peril, and that his negligence terminated prior to his injury, thereby giving defendant the last clear opportunity of avoiding injury to plaintiff. Failure to grasp that last clear chance then becomes the proximate cause of plaintiff's injury.

In Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. Ed. 1096, 1101, while discussing the effect of contributory negligence under the provisions of the Act, this Court said that the amount of recoverable damages

should be in proportion to the amount of negligence attributable to the employee; and that the language in the Act "can only mean that where the **causal** negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount." This language was used again by this Court in Seaboard Airline R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. Ed. 1069, 1070.

(2) It is obvious, therefore, that if after the termination of plaintiff's negligence and upon actual discovery of his danger by defendant, the latter has an opportunity to avoid injuring the former, neither plaintiff's nor defendant's antecedent negligence can form any part of the proximate cause of plaintiff's injury, and whatever negligence either party to the action may have been guilty of is, for that reason, removed from consideration. The duty then for the first time in the course of the happening rests upon defendant to try avoid injury to plaintiff in view of the situation as it exists at that moment; that is, without any regard to whose fault has placed plaintiff in the perilous situation, it becomes the duty of the defendant, if he has actual notice of plaintiff's danger, to try to avoid injury to him. But, unless plaintiff's negligence has at that moment ceased, defendant does not have the last clear opportunity of avoiding injury to plaintiff. He has no later opportunity to avoid such injury than has plaintiff.

A very clear statement of this principle will be found in Mehring v. Connecticut Co. (1912), 86 Conn. 109, 84 A. 301, 45 L. R. A. (N. S.) 896. The rationale of this doctrine is no better stated anywhere than in the dissenting opinion of Judge Hatcher in Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, in which the following language is quoted from Judge Cardozo, who said in Woloszynowski v. Ry. Co., 254 N. Y. 206, 172 N. E. 471, 472:

> "The doctrine of the last clear chance, however, is never wakened into action unless and until there is

brought to the defendant to be charged with liability a knowledge that another is in a state of present peril."

IV.

The facts in the case at bar, as developed by respondent's witnesses, and there are no others, fail to make a case under the federal last clear chance doctrine. There was but one witness who testified that he saw decedent killed. This sole eyewitness testified that decedent "stepped over that rail just as the engine hit him" (R. 45).

DeBaur v. Lehigh Valley R. Co., 269 F. 964, was an action under the act to recover for the death of a flagman who was killed while sitting on the track with his feet inside the rail, his elbows resting on his knees, and his head down on his arms. Recovery was denied because it was held that defendant could not have avoided killing decedent after actually discovering his perilous position. Subsequent to that time, the court said, the engineer did all that could be expected of him under the circumstances.

In Southern R. Co. v. Verelle, 57 F. (2d) 1008, a flagman stepped directly in front of a moving engine and was killed. Recovery was denied on the ground that there was no evidence showing that the enginemen had any reason to suspect that decedent intended to step on the track directly in front of the train; and when that fact became apparent it was too late to avoid killing him. These cases appear to be directly in point, especially the Verelle Case.

In Unadilla Valley R. Co. v. Caldine, 278 U. S., l. c. 142, 73 L. Ed., l. c. 232, which involved a collision of trains because Caldine violated a meeting order, it was contended he should have been specially warned of the position of the second train. In the course of the opinion Mr. Justice Holmes said:

> "A failure to stop a man from doing what he knows he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message (of warning) would only have given him another motive for obeying the rule that he was bound to obey."

It must be kept in mind that decedent had been warned of the exact movements to be made by the locomotive and the freight car (R. 22, 46). One of the predicates of liability in respondent's principal instruction was the failure to warn decedent by sounding the whistle (R. 148), although the locomotive bell was ringing during the entire switching movement (R. 44, 80).

V.

This record discloses that decedent was guilty of inexcusably gross negligence which alone directly caused his death.

His foreman had told him the particulars of the intended switching movement, not once but three times. He had warned decedent to look out for both the engine and the car, not once but three times (R. 22, 46). The locomotive bell was sounding an additional warning to decedent throughout the entire movement (R. 44, 80). Decedent had no present duty which could have distracted him in any way, as he had no part to play in the actual switching movement (R. 47, 48). He had no duty to perform until the freight car had reached track No. 4 when he was to block it and thereby prevent its rolling back west and fouling the switch point (R. 46, 54). It is clear, therefore, that decedent's duties could not have caused him to forget the warning given him by his foreman.

Nevertheless, despite the warnings given by the foreman, despite the ringing engine bell, despite his knowledge of the details of the movement, decedent unexplainedly

stepped "directly in front of the locomotive tender" (the engine was backing); "stepped over the rail just as the engine hit him" (R. 45). So testified the sole eyewitness to the casualty.

The authorities cited under V in the Summary of Argument hold that under these circumstances decedent was solely responsible for his death.

VI.

Despite the fact that all of the evidence in the trial of this case was produced by witnesses placed upon the stand by respondent, whose testimony was in no way inherently incredible, was uncontradicted and was entirely without display of any hostility towards respondent, her counsel in arguing the case to the jury took the position that his own witnesses were unworthy of belief, and that even though there was no evidence to contradict anything his witnesses had said, the jury should refuse to believe them and base a verdict upon the theory that the actual facts, though not proved, were exactly contrary to those shown in evidence by his own witnesses. In other words, in legal effect, counsel told the jury that the witnesses whom he had placed on the witness stand were not worthy of belief, that their testimony was false, and that although he had no evidence which contradicted them, the jury should base its verdict upon the hypothesis that his witnesses had testified falsely and that the facts were exactly contrary to their testimony (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190).

VII.

Respondent's counsel not only asked the jury to, and the jury did, render a verdict in his favor on the theory that his own witnesses had testified falsely, but he viciously attacked his witnesses, appealed to the passions

and prejudices of the jurors and thereby prevented petitioner from having a fair trial.

He repeatedly charged his own witnesses with false swearing; several times requested the jury not to believe respondent's evidence but to find the facts exactly contrary to her own uncontradicted proof; and warned the jury that they should be extremely careful in accepting the testimony of his own witnesses because they were in appellant's employ (R. 181). P. R. Co. v. Chamberlain, 228 U. S., l. c. 343, 77 L. Ed., l. c. 824.

He misstated the law with respect to the basis for measuring respondent's damages (R. 149). He went entirely outside of the record to tell the jury that he knew why decedent was in the position that he was when he was killed and that decedent was looking for a block to keep the car which was being switched from rolling back and fouling the switch point (R. 186), although there was no evidence to support such a statement.

That the verdict of the jury herein was excessive admits of no possibility of a doubt. The trial judge ordered a remittitur of Ten Thousand Dollars ($10,000.00) because of its excessiveness (R. 195).

The argument of respondent's counsel, standing alone, is amply sufficient to destroy the judgment herein. M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

Petitioner therefore respectfully urges this Court to issue its writ of certiorari to the Supreme Court of Missouri.

Respectfully submitted,

ARNOT L. SHEPPARD,
Attorney for Petitioner,
302 Union Station,
St. Louis, Missouri.